IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 39

DAVID E. KENEY, *Petitioner,*

v.

PEOPLE OF THE STATE OF NEW YORK

On Petition for a Writ of Certiorari to the County Court of the County of Monroe, New York

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PETITIONER'S REPLY BRIEF

The Petition for a Writ of Certiorari in this case was filed on December 29, 1964. By direction of the Court, the District Attorney of Monroe County filed a Brief in Opposition dated April 14, 1965. Action on the Petition has been withheld by the Court pending the

resolution of the *Ginzburg, Mishkin* and *Fanny Hill* cases—all decided on March 21, 1966. It now becomes appropriate to reassess the instant Petition in light of those three decisions.

1. The Charge That the Obscenity of the Books Is to be Determined Solely by Their Appeal to the Prurient Interest of "Those Who May be Sex Perverted."

The first question presented by the Petition, dealing with the constitutional propriety of this aspect of the jury charge, has in no way been diluted or deprived of its appropriateness for review by anything decided in *Ginzburg, Mishkin* or *Fanny Hill*. All three decisions heeded, and indeed reinforced, the basic obscenity test enunciated in *Roth* v. *United States*, 354 U.S. 476, 489—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." And it is that test which renders constitutionally invalid that portion of the jury charge in question.

The *Mishkin* opinion, pp. 6-7, adjusted the "prurient appeal" aspect of the *Roth* test only to the extent of permitting material addressed "to a clearly defined deviant sexual group" to be tested "in terms of the sexual interests of its intended and probable recipient group." But the *Mishkin* opinion made clear that such a recipient group must "be defined with more specificity than in terms of sexually immature persons" and that there was to be no return to "the most-susceptible-person facet of the *Hicklin* test." And the recipient group in *Mishkin*, composed of those interested in such deviations as sado-masochism, fetishism and homosexuality, was found to have been defined with sufficient specificity.

But the instant case in no way involves material designed to appeal to any such sexually deviant group. The material itself bears no resemblance to that involved in *Mishkin*. There was no evidence and no claim by the prosecution that the three paper-back books involved were designed to appeal to deviant rather than normal sexual interests. There was thus no basis for these publications to be judged other than by the original *Roth* standard of their appeal to the prurient interest of "the average person."

The judge's charge that the prurient appeal was to be judged in terms of "those who may be sex perverted" or those "who are already perverted to future acts of perversion" was a bald reversion to the "most-susceptible-person facet of the *Hicklin* test." There was no attempt, as *Mishkin* requires, to define the recipient group—i.e., what the judge termed the "sex perverted"—"with more specificity than in terms of sexually immature persons." So far as the jury charge is concerned, "sex perverts" appear to be nothing more than an undefined group of sexually immature persons to whom the material in question might be appealing.

Thus the judgment below, affirming the conviction, remains in direct conflict with the *Roth* case and its definition of obscenity. And it remains in direct conflict with *Volanski* v. *United States,* 246 F. 2d 842, 844 (C.A. 6), which outlawed the testing of the obscenity of photographs by their prurient appeal to sadists, masochists and other types of sexual deviants, there being no evidence that the photographs were of a deviant nature. The obvious importance of this issue, stemming from the inconsistency of the jury charge with the *Roth* standard, continues to warrant the grant of certiorari in this case.

2. The Charge That Scienter May be Inferred From the Title, Covers and Contents of the Books.

Only the *Mishkin* opinion deals with the constitutionally required element of scienter. And it was there held that scienter was fully established in that case by virtue of "appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books." Slip opinion, pp. 9-10.

But the petitioner in this case is in a vastly different position than the appellant in *Mishkin*. This petitioner is an operator of a small magazine store who had received the books as part of a large shipment shortly before the arrest; he had not ordered the books by title, had never heard of them and had never read or discussed their contents. In short, the evidence was uncontradicted that he had no knowledge whatever of the contents of the books. Such an individual can in no way be likened to the appellant in *Mishkin*, who not only knew the contents of the books that he sold but directed and outlined their preparation and engaged in their commercial publication and distribution. While the titles and covers were among the elements of scienter mentioned in *Mishkin*, those elements appear only in the context of the vast commercial publishing enterprise personally conducted by the appellant.

The instant case thus brings into sharp focus the constitutional permissibility of permitting a jury to

ascribe scienter to a bookseller—as distinguished from a publisher or distributor—*solely* on the basis of the titles and covers and contents of the books which he offers for sale and which he has not read. Does he offer all books within his store at the peril of having some jury ascribe scienter to him based solely on the jury's view of the titles, covers and contents? Must he be compelled, if he wishes to avoid conviction, to read all the countless books that he offers for sale and adjudge their possible obscenity? What role do mere covers and titles play in determining scienter where the contents have not been read by the bookseller?

These are questions left unanswered by either *Smith* v. *California,* 361 U.S. 147, or the *Mishkin* decision. They are questions of vital concern to all booksellers in the United States, especially in view of the great emphasis now placed by this Court on "the circumstances of presentation and dissemination of material" (*Ginzburg,* p. 7) in the determination of what is obscene. They are questions that demand answers if booksellers are to know how to offer books for sale within the constitutional principles so recently laid down by this Court. Booksellers are entitled to know whether scienter is to be grounded on something more substantial than what is involved in this case and whether they must remove from sale all books with lurid titles or covers. They must know, if they are to continue safely in business, the extent to which they are accountable, in terms of scienter, for the contents of all that they offer to the public.

For these various reasons, the second question presented by the Petition remains very much alive and worthy of full consideration by this Court.

3. The Charge That the Contemporary Community Standards by Which Obscenity Was to be Determined Were Those of the Local Community and to Which the Jury Felt the Community Was Entitled.

The importance and reviewability of the question as to whether a jury should assess obscenity in the light of local as distinguished from national community standards remain unaffected by the decisions in *Ginzburg, Mishkin* and *Fanny Hill*. None of those decisions purports to discuss, let alone resolve, this recurring question. But to the extent that the *Roth* standard can now be satisfied by proof that a publication is "exploited entirely on the basis of its appeal to prurient interests" (*Ginzburg*, p. 11), it becomes all the more important whether the commercial pandering or the prurient interests are to be assessed in terms of local or national viewpoints.

4. The Question Whether the Books in Question Can Be Considered "Hard-Core Pornography."

As this Court recognized in its *Mishkin* opinion, p. 6, New York courts have interpreted "obscenity" within the meaning of § 1141 of the New York Penal Law, under which this case arose, to cover only so-called "hard-core pornography." This standard was acknowledged in *Mishkin* to be "more stringent than the *Roth* definition."

Without any evidence before it other than the three books themselves, the Monroe County Court, in affirming petitioner's conviction, found the books in question to be "hard-core pornography" or "dirt for dirt's sake." But when precisely the same type of books was before this Court in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, Mr. Justice Stewart was of the view

(378 U.S. at 214) that "the books here involved were not hard-core pornography" and that "Kansas could not by any procedure constitutionally suppress them." Mr. Justice Stewart's reiteration in *Ginzburg* (dissent, pp. 2-3) that only material properly found to be "hard-core pornography" can be constitutionally suppressed only adds to the substantiality of the question posed as to the books in question. Can this type of publication, so widely distributed today throughout the United States, properly be found to be "hard-core pornography" as that term is commonly defined? See description of such pornography quoted from the Solicitor General's brief by Mr. Justice Stewart in *Ginzburg* (dissent, p. 3, fn. 3).

Moreover, this question arises in a context where there has been no proof of commercial pandering or "exploitation of interests in titillation by pornography" (*Ginzburg*, p. 12) in the sale of these books by the petitioner. The record shows nothing more than the sale of three books by a bookseller, books with lurid covers and titles that had not been read or examined by him. For constitutional purposes, therefore, the issue as to the "hard-core pornography" nature of these books arises in the abstract, cf. *Fanny Hill*, and may properly be resolved by this Court on the record before it.

CONCLUSION

Since none of the questions presented in the Petition have been resolved or mooted by the decisions in *Ginzburg*, *Mishkin* and *Fanny Hill*, and since the Brief in Opposition has in no way detracted from the validity of the reasons why certiorari should be

granted, petitioner renews his request that the Petition be granted as to all questions presented therein.

Respectfully submitted,

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March 29, 1966.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

KENEY *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, NEW YORK.

No. 2. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the County Court of Monroe County, New York, is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.